

outcome more satisfactory to all participants than the Librarian's decision. I also monitored closely the progress of negotiations between the RIAA and webcasters. On July 31, I sent a letter with Senator HATCH to Sound Exchange, which was created by the RIAA to act as the agent for copyright holders in negotiating the voluntary licenses with webcasters under the DMCA and to serve as the receiving agent for royalties under the CARP process. The letter posed questions on the status of the reported on-going negotiations between RIAA/Sound Exchange and the smaller webcasters, the terms being proposed and considered, and how likely the outcome of those negotiations would be to produce viable deals for smaller webcasters, while still satisfying the copyright community.

Reports on the progress of these negotiations were disappointing, which makes this legislation all the more important. As a general principle, marketplace negotiations are the appropriate mechanism for determining the allocation of compensation among interested parties under copyright law. Yet, we have made exceptions to this general principle, as reflected in this legislation and the very compulsory license provisions it amends.

The legislation reflects a compromise for all the parties directly affected by this legislation—small webcasters that could not survive with the rates set by the Librarian and copyright owners and performers who under this bill will give certain eligible webcasters an alternative royalty payment scheme. This legislation does not represent a complete victory for any of these stakeholders. Artists and music labels may believe that they are forgoing significant royalties under this legislation and I appreciate that they are those in the webcasting business, who are either not covered or not sufficiently helped by the bill, who believe that this legislation should do more. As one analyst at the Radio and Internet Newsletter stated, in the October 11, 2002 issue, "Clearly, the 'Small Webcaster Amendments Act of 2002' (a/k/a H.R. 5469) is an imperfect bill that doesn't fix everything for everybody . . . Still, overall, does it do more good than harm for more people? My belief is that many are helped one way or the other and virtually no one is assured of being hurt. Thus, the answer, on the whole, would be yes."

I know that most webcasters share my belief that artists and labels should be fairly compensated for use of their creative works. This legislation provides both compensation to the copyright owners and helps to support the webcasting industry by offering more variable payment options to small webcasters than the one-size-fits all per performance rate set out in the original CARP and Librarian decisions. The rates, terms and record-keeping provisions are applicable only to the parties that qualify for and elect to be

governed by this alternative royalty structure and no broad principles should be extrapolated from the rates, terms and record-keeping provisions contained in the bill. The Copyright Office is presently engaged in a rule-making on record-keeping and this bill does not supplant that ongoing process.

This legislation does three things to help small webcasters pay royalties and stay in business. As one Vermont webcaster told me, "Although the percentage of revenue is too high, at least we have the option. A percentage of revenue deal will enable [us] to stay in business moving forward, grow our audience, and compete."

First, the Librarian royalty rate is based on a per performance formula, which has the unfortunate effect of requiring webcasters to pay high fees for their use of music, even before the audience of the webcaster has grown to a sufficient size to attract any appreciable advertising revenues. Without any percentage of revenue option (as provided by the legislation), the webcasting industry would be closed to all but those with the substantial resources necessary to subsidize the business until the advertising revenue caught up to the per performance royalty rate. The bill provides a percentage of revenue option for small businesses with less than \$500,000 in gross revenue in 2003 and \$1.25 million dollars in 2004. The bill also provides for minimum fees and a percentage of expenses floor on the royalties, to assure that copyright owners and artists receive some payment for performance of their music.

Second, for noncommercial webcasters, such as college webcasters, the bill corrects an anomaly in the Librarian's decision. Under that decision, non-profit entities held FCC licenses were given a lower per performance rate than were commercial entities. However, the decision made no such provision for noncommercial entities that were not FCC licenses. The bill extends the lower rate to all nonprofit entities.

Finally, the bill reduces the retroactive burden on many of the small commercial webcasters by allowing them to make their payments based on a percentage of revenue or percentage of expense, but also allows both small commercial and noncommercial webcasters to pay these retroactive fees in three payments over the span of a year.

To accommodate the concerns of artists and the RIAA, the bill provides for the reporting of information about which songs were played by the small commercial webcasters. This information will be used to account properly for the distribution of the royalties to the copyright holders and the artists.

A number of concerns have been raised that the rate, terms and record-keeping provisions in the bill do not constitute evidence of any rates, rate structure fees, definitions, conditions or terms that would have been negotiated in the marketplace between a

willing buyer and willing seller. This concern stems from the DMCA's statutory license fee standard directing the CARP to establish rates and terms "that most clearly represent the rates and terms that would have been negotiated in the marketplace between a willing buyer and a willing seller," rather than a determination of "reasonable copyright royalty rates" according to a set of balancing factors. This new webcasting standard may be having the unfortunate and unintended result that webcasters and copyright owners are concerned that the rates and terms of any voluntary licensing agreements will be applied industry-wide. The new webcasting standard appears to be making all sides cautious and reluctant to enter into, rather than facilitating, voluntary licensing agreements.

Passage of this legislation does not mean that our work is done. As this webcasting issue has unfolded, I have heard complaints from all sides about the fairness and completeness of procedures employed in the arbitration. Indeed, the concerns of many small webcasters were never heard, since the cost of participating in the proceedings was prohibitively expensive and their ability to participate for free was barred by procedural rules. One thing is clear: Compulsory licenses are no panacea and their implementation may only invite more congressional intervention. To avoid repeated requests for the Congress or the courts to intercede, we must make sure the procedures and standards used to establish the royalty rates for the webcasting and other compulsory licenses produce fair, workable results. Next year, we should focus attention on reforming the CARP process.

Mr. REID. Madam President, I ask unanimous consent that the Helms amendment at the desk be agreed to; the bill, as amended, be read a third time, passed, and the motion to reconsider be laid on the table, with no intervening action or debate.

The PRESIDING OFFICER. Without objection, it is so ordered.

The amendment (No. 4955) was agreed to.

(The amendment is printed in today's RECORD under "Text of Amendments.")

The bill (H.R. 5469), as amended, was read the third time and passed.

#### MEASURE PLACED ON THE CALENDAR—H.J. RES. 124

Mr. REID. Madam President, I ask unanimous consent that H.J. Res. 124, the continuing resolution just received from the House, be placed on the calendar.

The PRESIDING OFFICER. Without objection, it is so ordered.

#### AFGHANISTAN FREEDOM SUPPORT ACT OF 2002

Mr. REID. Madam President, I ask unanimous consent that the Senate